United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7244

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

IRVIN GILL, ROBERT ZIEGLAR, KATHERINE HARRIS, MARIE FITZHUGH, et al.,

Plaintiffs-Appellants

-vs-

P/S

MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, JAMES REED, DIRECTOR OF MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, JAMES REED, DIRECTOR OF MONROE COUTNY DEPARTMENT OF SOCIAL SERVICES.

CHARLES G. FINCH, Chief Counsel
111 Westfall Road
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Attorney for James Reed, Director
and Attorney for Monroe County
Department of Social Services
Frank P. Celona, of Counsel

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TABLE OF AUTHORITIES CITED

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e)

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, <u>except</u> that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved <u>within three hundred days after the alleged unlawful employment</u> practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 1981

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinace, regulations, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Constitution, First Amendment

Congress shall make no law respecting...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Ninth Amendment

The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Executive Law, Par. 297 (5)

5. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

STATEMENT OF ISSUES PRESENTED

(1) Was it error for the Court below to dismiss this action because:

(a) The complaint fails to state a cause of action? No.

(b) Plaintiff's lack standing to bring this suit? No.

(c) It is barred by the statute of limitations? No.

(d) It fails to join indispensable defendants such as the New York State Civil Service Commission and the New York State Department of Social Services? No.

(2) Did the Court below err by holding in abeyance discovery proceedings pending decision of the defendants motions to dismiss? No.

(3) Did the Court below err in dismissing the action against the named individuals: to wit, James Reed, Fred Lapple, Gabriel Russo? No.

STATEMENT OF THE CASE

This is an appeal from the Order and Decision of Honorable Harold P. Burke, Judge of the United States District Court for the Western District of New York, dated April 21, 1976, which Order and Decision dismissed the plaintiff's complaint of employment discrimination because the complaint failed to state a cause of action, plaintiff's lack of standing to bring this suit, the action is barred by the statute of limitations, and the New York State Department of Social Services and the New York State Civil Service Commission and the respective directors are indispensable defendants. (A 312)

The Summons and Complaint in this action was received by defendants, Monroe County Department of Social Services and its Director, James Reed, et al on December 1, 1975. Defendants responded by December 15, 1975 with an answer, affirmative defense, counterclaim and motion to dismiss. Defendants drafted and submitted a formal motion to dismiss (A 229, 239) on or about January 15, 1976. It was set for argument on January 26, 1976, but postponed, at plaintiffs' request, until February 9, 1976 at which time oral arguments were heard.

Prior to the commencement of this action a determination

was made on June 27, 1974 wherein the Equal Employment Opportunity Commission decided that defendant Monroe County Department of Social Services and Monroe County Civil Service Commission were not guilty of discrimination in their general hiring practice, (A 281) although there was a statistical inference that defendants promotional practices showed some sort of imbalance. Conciliation then followed which culminated in an agreement which was unequivocably rejected by plaintiffs' attorney, Ms. Logan-Baldwin, on July 15, 1975. Right to sue notices were then issued and this action ensued. The action was begun by 36 named plaintiffs individually and on behalf of all other persons similarly situated alleging a policy of discrimination under Title VII of the Civil Rights Act.

Plaintiffs seek relief in the form of a declaratory judgment, an injunction and compensatory damages of $40,000,000.00.

POINT I

THE PLAINTIFFS, INDIVIDUALLY, AND AS A WHOLE FAIL TO STATE A CAUSE OF ACTION.

A. The plaintiffs are united in an apparent class action under the facade of racial discrimination. However, a mere perusal of the complaint shows that the plaintiffs are a curious blend of individuals who are unrelated to each other in the typical class action sense. Each of the plaintiffs present different employment backgrounds and circumstances which in no way unites them. For example, nine of the plaintiffs have failed required Civil Service examinations, eight of the plaintiffs refuse to take required Civil Service examinations while others fall into various other sub-classifications. The first two classes are unrelated in that those that have refused to even take these required exams are alleging discrimination before any discrimination even exists. This is not the same situation as those that have taken and failed exams as they can allege discrimination, eventhough in that sense, the New York State Civil Service Commission is the proper defendant for this group of plaintiffs and not the Monroe County Department of Social Services. This is not a racial discrimination action but rather a diverse set of employees who allege promotional discrimination. Indeed, two of the original thirty-six plaintiffs are white persons who do not allege personal discrimination but rather

allege "embarrassment" at not being able to work for a minority supervisor.

Many of the allegations of the complaint are stale, nebulous and speculative; some plaintiffs were not even employees at the time of the acts complained of; many of the plaintiffs find themselves in circumstances which are the product of their own doings or misdoings.

Mere conclusionary allegations do not provide an adequate basis for assertion of a claim for violation of civil rights statues. Albany Welfare Rights vs. Schreck 463 F 2d 620. None of the plaintiffs, except Gill, Zieglar and Fitzhugh, filed complaints with the New York State Division of Human Rights or took any other action. For example, why did they not pursue any remedies under the New York State Civil Service Law; why did they not pursue their claims in the state courts? The complaints of Gill, Zieglar and Fitzhugh are still pending before the State Division of Human Rights.

Assuming, arguendo, that Gill, Zieglar and Fitzhugh each allege a viable cause of action, each should be severed from the action; each should pursue his own case; the various causes of action of the other plaintiffs should remain dismissed.

The plaintiffs claim a continuing pattern of discrimination,

but this claim is gravely weakened by the hold in Noble v U. of R. decided 7/12/76 by N. Y. App. Div. Fourth Dept., (copy attached appendix A) which holds that a failure to promote is a single act; the wrong is not a continuing one.

B. The plaintiffs claim the Federal Court has jurisdiction under the First, Ninth and Fourteenth amendments to the U. S. Constitution; under 42 U.S.C. 1981 42 U.S.C. 1983, Title VII 42 U.S.C. 2000e-5e.

Title VII, 42 U.S.C. 2000e is the only statute which gives the court jurisdiction because effective March 1972 governmental agencies were included in the definition of "person." The other statutes are not applicable since they have not, and still do not include a governmental agency as a "person." Consequently, if the plaintiffs have a cause of action, it is only by virtue of 42 U.S.C. 2000e.

POINT II

PLAINTIFFS LACK STANDING TO BRING THIS SUIT. THIS IS NOT A PROPER CLASS ACTION SINCE THERE IS NO COMMON QUESTION OF LAW OR FACT.

This is not a proper class action due to the fact that the plaintiffs are so diverse that they do not and cannot raise a question of law or fact common to all persons. Both Rule 20 and Rule 23 of the Federal Rules of Civil Procedure require a common question of law or fact. Rule 20(a) of the Federal Rules of Civil Procedure states:

> "All persons may join in one action as plaintiffs if they assert any right of relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrance, or series of transactions and if any questions of law or fact common to all these persons will arise in the action".

Clearly this action involves diverse plaintiffs. Some of these plaintiffs, Eladia Fuentes, Velma Williams, Vivian Silas, Salena Matthews, Annie Hicks, Harriett Weathers, Stella McDonald and Saide Johnson, have refused to take the required Civil Service examinations, some, Charles Campbell, Dorothy Dobson, Inez Charles, Alice Zealy, Rosie Lee Sailes, Betty Joe Travis, Luther Robinson, Grace Rutherford, Luz Martinez, have taken the exams and failed them, thus not qualifying for the eligibility lists, two are white persons, Linda Gaffney and Michelle Cournoyer, who assert some sort of embarrassment at not having served under minority supervisors, while others fall into a "catch-all"

group who assert various diverse complaints. In reality, the only common thread that sews these plaintiffs into a class action is that Monroe County Department of Social Services is the defendant. The truth is that these plaintiffs are using their minority status to camouflage the weakness of their individual cases.

A similar set of facts as those alleged here occurred in Smith vs. North America Rockwell Corp. - Tulsa Div., 50 F.R.D. 515 (1970). Four plaintiffs joined together and filed an action against their employer alleging violations of Title VII, 42 U.S.C. § 2000e et seq and 42 U.S.C. § 1981. As in the present action, each plaintiff asserted a different grievance based on separate and individual occurrences, yet they attempted to band together in a single action solely because each was of minority status. As here, each of the plaintiffs worked under different conditions, different supervisors and different levels yet they all claimed that it was a racial discrimination case, based on an alleged company policy of discrimination. Said the court:

> "Only in an ultimate and abstract sense do the allegations of the complaint share anything in common: all deal with purported racial discrimination in employment". (p. 523)

The court also said that there was no common question of law or fact. The court stated at page 524:

> "Whether a defendant unlawfully discriminated against one plaintiff with respect to promotion or job assignment in a given department is not common with the question whether defendant unlawfully discriminated against another plaintiff in a separate department. The second act constitutes a separate, albeit similar conduct".

As in the Smith case, there is simply no common question of law or fact among the plaintiffs in the present action. They all have separate claims arising, if at all, out of diverse factual situations. If this case actually were to go to trial, there would be thirty-six different factual situations presented to this court, all of which would be unrelated.

As to the class action aspect, the court in Smith held it not to be a proper class action and stated that each plaintiff could start their own class action, if possible, if they could find others with exactly similar situations. The present case falls into the same category since each plaintiff here asserts a different set of facts and occurrences. Each plaintiff has different employment histories and different qualifications. At best, only one or two of the named plaintiffs may have legitimate causes of action - the others are simply attempting to gain a "free ride". Clearly the Smith case cuts through the veil of racial discrimination to get to the heart of the matter which, as here, are isolated and diverse allegations concerning individual complaints. Certainly there is no common ground among these plaintiffs to allow a class action to proceed. Mosley v General Motors Corp. 63 FRD 127 (1973)

POINT III

PLAINTIFFS CAUSE OF ACTION, AS A WHOLE, AND INDIVIDUALLY IS BARRED BY THE STATUTE OF LIMITATIONS.

Every cause of action, including a civil rights or discrimination case, is governed by a statue of limitations. Respondents maintain and the lower court found that plaintiffs causes of action, if any, are barred by the statute of limitations. The plaintiffs claim they are not barred because the alleged acts of discrimination are still continuing. However, each act is a separate act.

The plaintiffs' complaint, individually and intoto is time barred.

A. 42 U.S.C. 2000e5(e) of Title VII states:

(1) that a charge shall be filed within 180 days after the alleged unlawful employment practice occurred; except

(2) that if an aggrieved person institutes proceedings with a local or state agency, then his charge shall be filed within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the state or local agency has terminated proceedings whichever is earlier.

Gill, Zieglar and Fitzhugh were the only three plaintiffs

who filed complaints in September of 1973 with the State Division of Human Rights, and their complaints are still pending.

Gill alleges he passed a Civil Service test in September 1971, was third on the list, and was passed over by a person who ranked fourth. (A 17). Gill waited two years to file a complaint and this is time barred by the above section.

Zieglar alleges he was demoted in December 1971 (A18). Approximately 21 months later, September 1973, he filed a complaint. He too is time barred by the above statute.

Fitzhugh alleges in 1964 she passed the supervisors exam, was passed over, then was given the position in 1966. Seven years later in August or September 1973, she filed a complaint. (A 20). Obviously Fitzhugh is time barred under the above statute.

None of the other plaintiffs filed complaints with the State Division of Human Rights. Therefore, they would have had to file charges within 180 days under Title VII. They did not, and are therefore time barred.

About 33 of the plaintiffs filed charges in September, 1973 with the EEOC. The dates of their alleged acts of discrimination range from 1958 - 1972. They also are more than 180 days old, and therefore time barred under the section.

B. N.Y. State Human Rights Law, Exec. Law Par 297 (5) sets out a one year statute of limitations with reference to unlawful discriminatory practice.

If this statute is applied to plaintiffs' complaint, each alleged cause of action would be barred because they are all more than one year old.

C. Assume, arguendo, that some plaintiffs do state causes of action, based on 42 U.S.C. 1981 1983 or the amendments to the U.S. Constitution.

Then plaintiffs' action is governed by the applicable New York State Statute of Limitations in federal civil rights actions. Swan v. Board of Higher Eduction, 319 f.2d 56 (Second Circuit 1963) held that since the Civil Rights Act, 42 U.S.C. § 1983, did not delineate a specific statutory period, the applicable period of limitation is that which the State of New York would use if the action had been brought before their state court. In Ortiz v. LaValle, 442 f.2d 912 (Second Circuit 1971), the Court relied on the Swan language in deciding that an action brought pursuant to the federal Civil Rights Act is to be tested against the state statute of limitations to determine whether or not the action is barred. The Ortiz court ruled that the appropriate New York limitation period, which is 3 years, is contained in the Civil Practice Law and Rules § 214(2) for "an action to recover upon a liability....created or imposed by statute.." (p.914).

This position in Ortiz was confirmed in Kaiser v. Cahn, 510 f.2d 282 (Second Circuit 1974) in which the court cites both Swan and Ortiz and reaffirms that the federal courts borrow the state statute when no federal statute exists and that this rule applies specifically to cases brought as federal civil rights actions.

Specifically, in the present action before this court, plaintiffs allege certain acts of discrimination back as far as 1964. All of the above-cited cases clearly point out that the three year New York Statute of Limitations applied. Therefore, as to any alleged discrimination that may have occurred prior to December 1, 1972 (three years prior to the date of commencement of this action), the plaintiffs are barred from raising these in the present action. Indeed, some of the plaintiffs do not even specify when alleged acts of discrimination occurred against them. They simply assert that they have been denied opportunity for advancement due to their race. But that is insufficient - an act of alleged discrimination that occurred prior to December 1, 1972 cannot be brought in this action. In some instances, employees have waited almost 20 years before alleging discrimination by the Monroe County Department of Social Services. During that period, there have been several directors. The whole idea of a statute of limitations is to prevent such stale claims from being revived.

POINT IV

THE NEW YORK STATE CIVIL SERVICE COMMISSION IS AN INDISPENSABLE PARTY TO THIS ACTION.

Assuming that some of the plaintiffs have a legitimate cause of action, Monroe County Department of Social Services is simply not the proper defendant. If the plaintiffs do have complaints, they are against the New York State Civil Service Commission. Section 50, 51 and 52 of the New York State Civil Service Law and case law thereunder, clearly and specifically state that the New York State Civil Service Commission has sole control over any decisions concerning required examinations. Department of Social Services cannot even determine whether tests for a position shall be open to all or be promotional, in that only certain classes of employees are eligible to take the exams. This latter point is stated in Martin vs. Conway, 106 New York Supp. 2d 341 in which an Article 78 proceeding was brought to compel the New York State Civil Service Commission to hold a promotional examination rather than an open examination. The court held that this determination was solely confided by the State Legislature to the Civil Service Commission which performs in a legislative capacity. Monroe County Department of Social Services does not have any input in this determination. It is totally left up to the discretion of the Civil Service Commission.

As to the preparation, administration and evaluation of

the examinations, the Civil Service Commission has total and complete control. In Fitzgerald vs. Conway, 275 App. Div. 205, 88 NYS 2d 649 (1949), plaintiffs brought an Article 78 proceeding against the Civil Service Commission for an order cancelling certain eligibility lists made by the commission. In the course of the opinion the court stated at p. 655.

> "The preparation and conduct of civil service examinations are administrative functions vested in the Civil Service Commission. In the exercise of these functions the Commission has broad discretionary powers to determine, among other things, all matters relating to the time, and place of the examinations; the selection of questions to be used; the manner of conducting the tests; the relative values to be given to different sections of the tests; whether the examinations shall be open or promotional, and the preliminary requirements and subjects of the examination".

Clearly Monroe County Department of Social Services cannot be said to be in any position of influence as far as the Civil Service process is concerned. All matters that relate to these tests are in the absolute control of the Civil Service Commission. Therefore, any of the plaintiffs who allege that Monroe County Department of Social Services is discriminating against them because they have either failed civil service examinations or refuse to take them because they are supposedly discriminating are obviously pursuing the wrong defendant. Thus, when plaintiffs Campbell, Dobson, Charles, Zealy, Sailes, Travis, Robinson, Rutherford and Martinez, who have all failed

required examinations, state that the tests are not related to the job skills required, their complaint, if any, exists against the New York State Civil Service Commission and not the Department of Social Services. The same conclusion must be drawn for those plaintiffs who refuse to take the exams because they feel they cannot pass them due to their content.

In Castro v. Beecher, 334 F. Supp. 930 (1971 Mass), plaintiffs were six blacks and two Puerto Ricans who alleged discrimination in recruitment and hiring of policemen against the Massachusetts Civil Service Commission, members of the commission and the Boston police commissioner. Plaintiffs were challenging several requirements which included a height requirement, a 100 yard swimming test and entrance examinations, designed, administered and evaluated solely by the Massachusetts Civil Service Commission. The Civil Service Commission reported the results of these exams to the Police Commissioner who then made his selections.

The case against the Police Commissioner was dismissed since the court ruled that the Massachusetts Civil Service Commission had sole control over the exams. After careful scrutiny of the substance of the exams, the court placed liability for any discrimination in the laps of the Civil Service Commission and not the police department or the Police Commissioner. Said the court at p. 943:

> "However, defendant McNamara, the Police Commissioner of the City of Boston, stands in a position different from the other defendants...the evidence shows he did not have any part in conducting the police entrance examinations, or designing their tests, or using their results to prepare eligibility lists and certificates. All he did was to use the civil service certificates to make appointments.... He acted after the discrimination had been effected; he did not approve of it, add to it, or cause it to be more effective".

Defendant Reed and Monroe County Department of Social Services stand in exactly the same position as Police Commissioner McNamara and the Boston Police Department. If any discrimination has taken place in regard to any transaction concerning civil service testing or evaluation, Monroe County Department of Social Services and James Reed have absolutely no imput into the Civil Service process. As in Castro, Reed and Monroe County Department of Social Services acted only after any alleged discrimination took place. Although, the Castro case involved alleged hiring discrimination and this action involves alleged promotional discrimination, the point is still the same; that Monroe County Department of Social Services and James Reed are not the proper defendants in this action since the alleged discrimination occurs, if at all, at the Civil Service level and is solely in their control.

POINT V

THE LOWER COURT DID NOT COMMIT ERROR AS FAR AS DISCOVERY PROCEEDINGS ARE CONCERNED.

Counsel for the plaintiffs alleges it was error for the court to dismiss this action while discovery proceedings were pending.

This is not so for the following reasons:

(A) The lower court did not rule on discovery motions, either for or against the plaintiffs. Therefore this cannot be the subject of the appeal. Counsel by letters to the Court dated June 17, 1976 and June 18, 1976 noted his objection. Appendix B.

(B) Prior to the time the defendants made the motion to dismiss, the defendants had filed extensive answers (A 136) and (A 144).

(C) The plaintiffs had available to them, all of the plaintiffs personnel files, and in addition thereto, the files of 52 other employees of the Monroe County Department of Social Services turned over to plaintiffs by the County of Monore pursuant to an order issued by Supreme Court in Monroe County in December of 1975.

POINT VI

IT WAS NOT ERROR FOR THE LOWER COURT TO DISMISS THE ACTION AGAINST THE NAMED INDIVIDUALS, SUCH AS JAMES REED.

Plaintiffs sued James Reed and other defendants individually. The fact of the matter is that any actions performed by James Reed were done solely in his official capacity as Director of the Monroe County Department of Social Services. He himself is an employee of the Social Services Department and County of Monroe. He became Director on or about September, 1972. There have been several directors prior to Reed, and many of the acts complained of occurred years prior to his becoming director and even prior to his being employed by Monroe County Department of Sccial Services.

If James Reed is to be personally liable, then it follows, that all the Directors before him would be personally liable. They are therefore indispensable parties who have also been left out of this lawsuit.

It should be noted that the plaintiffs filed their charges with the EEOC only against Monroe County Department of Social Services and not James Reed individually. (A280). Even the Right to Sue Notieces (A 59-126) only name Monroe County Department of Social Services as a Respondent, and not James Reed individually.

CONCLUSION

For the foregoing reasons, Defendant James Reed, Director of Monroe County Department of Social Services and Monroe County Department of Social Services respectfully requests that this Court affirm the decision of the lower court dismissing this action.

September 8, 1976

CHARLES G. FINCH, Chief Counsel
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and Attorney for Monroe County
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Frank P. Celona, of Counsel

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Defendants-Appellees, Monroe County Department of Social Services and James Reed, Director of Monroe County Department of Social Services was served on the Plaintiffs-Appellants and on the balance of Defendants-Appellees by my causing two copies thereof to be mailed to the attorney for the Plaintiffs, Emmelyn Logan-Baldwin, 510 Powers Building, Rochester, New York and to Joseph Pilato, Monroe County Office Building, Rochester, New York the attorney for the balance of the Defendants -Appellees, this 9th day of September, 1976.

Frank P. Celona

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September 9, 1976
Rochester, New York

APPENDIX A

Peck v. Genesee Federal Savings and Loan Assn., ——AD2d——, Appeal No. 1, decided herewith. (Appeals from Order of Monroe Supreme Court, Blauvelt, J. — Summary judgment.) Present: Moule, J.P., Cardamone, Simons, Mahoney, Dillon, JJ.

367. (Monroe Co.) — In the Matter of the Application of Fred Schrader, Respondent, v. Civil Service Commission of Monroe County, Appellant. — Judgment unanimously reversed without costs and petition dismissed. Opinion by Mahoney, J. (Appeal from Judgment of Monroe Supreme Court, Wagner, J. — Article 78.) Present: Moule, J.P., Cardamone, Simons, Mahoney, Dillon, JJ.

368. (Niagara Co.) — Board of Education of the City School District of the City of Lockport, New York, Appellant, v. Peter J. Licata, Respondent. — Order reversed without costs and summary judgment granted to defendant in accordance with Opinion by Dillon, J. All concur, except Simons, J., who dissents and votes to grant summary judgment to plaintiff, in an Opinion. (Appeal from Order of Niagara Supreme Court, Callahan, J. — Summary Judgment.) Present: Moule, J.P., Cardamone, Simons, Mahoney, Dillon, JJ.

369. (Erie Co.) — Salvatore Sedita, as President of Buffalo Council of Supervisors and Administrators, Appellant-Respondent v. Board of Education of the City of Buffalo, Respondent, Jane McDevitt, Intervenor - Respondent - Appellant. — Order insofar as it vacates Arbitrator's award unanimously affirmed, without costs, and otherwise appeals dismissed as moot. Opinion by Moule, J.P. (Appeals from Order of Supreme Court, Erie County, O'Donnell, J. — Arbitration.) Present: Moule, J.P., Cardamone, Simons, Mahoney, Dillon, JJ.

372. (Monroe Co.) — State Division of Human Rights on complaint of Barbara Noble, Respondent, v. University of Rochester and Strong Memorial Hospital, Appellants. — Order unanimously reversed without costs and motion denied in accordance with the following Memorandum: Appellants appeal from an order of Special Term which granted complainant's motion to enforce two subpoenas duces tecum issued by the private attorney of complainant Noble and which determined that the complaint, insofar as it charged the preferment of Mr. Hill over complainant, was not barred by the one-year period of limitation (Executive Law, § 297 [5]). ¶ Complainant Noble is a perfusionist at Strong Memorial Hospital. She alleges that appellants unlawfully discriminated against her because of her sex by appointing one Aaron Hill to a position which she sought and for which she was qualified, that of Chief Perfusionist. Mr. Hill's appointment was effective January 1, 1974. The complaint filed with the State Division of Human Rights on March 3, 1975 charged that appellants had unlawfully preferred Mr. Hill and had engaged in acts of discrimination towards women employees generally. The Division has not made a finding of probable cause and the matter is still in the investigative stage. ¶ The subpoenas are quashed. A private attorney may not issue a subpoena duces tecum during the investigatory stage of discrimination proceedings. ¶ There is no statutory provision in the Executive Law for the issuance of subpoenas by private attorneys, although the statute provides that the Division may issue a subpoena at "any stage of any investigation or proceeding before it" and may make rules with respect thereto (Executive Law, § 295 [7]). The Division rules permit private attorneys representing complainants to issue subpoenas as provided in the CPLR (9NYCRR 465.10). In turn, CPLR 2302 provides that an attorney may issue subpoenas in administrative proceedings. This power to issue subpoenas, however, was designed to make evidence available at a hearing on the merits. Before a determination of probable cause, the complainant may be represented by an attorney but the matter is to be investigated by the State Division. Thus, the statute provides for various preliminary procedures designed to promote amicable settlements (see Executive Law, § 297) and for the dismissal of a complaint "in the unreviewable discretion" of the Division if it finds that the complaint lacks substance. If the Division requires preliminary information obtainable by subpoena, the statute provides it with that authority, but before the hearing stage the Division should be free to work its will without interference by the complainant's private attorney, and the complainant is not permitted to use the subpoena power as a discovery device (see McKinney's Cons Laws of NY, Book 7B, CPLR 2302, David E. Siegel, Practice Commentary). ¶ Furthermore, the complaint, insofar as it relates to the Hill promotion, was filed more than one year after the incident and is time-barred. The statutory limitation is integral to the right of relief which the statute created. It is not a matter of defense. Unless the complainant brings the proceeding within the one-year period, she has no cause of action (Matter of Munger v. State Div. of Human Rights, 32 AD2d 502; and see Romano v. Romano, 19 NY2d 444, 447). The wrong is not a continuing one as Special Term held, because the promotion was a single act. Matter of Russell Sage Coll. v. State Div. of Human Rights (45 AD2d 153, affd 36 NY2d 985), relied upon by complainant, is inapposite. In that case complainant, one of three professors performing equal duties, received lesser pay than her male colleagues, although she had higher qualifications. Each pay check thus became a further act of discrimination. In this case there was only one alleged act of discrimination, the appointment of Mr. Hill. His higher salary and his continuing employment are the result of that promotion, not the result of any continuing discrimination. The complaint insofar as it charges appellants with unlawful discrimination in the appointment of Mr. Hill is dismissed. (Appeal from Order of Monroe Supreme Court, Boehm, J. — Proceeding pursuant to section 298, Executive Law.) Present: Moule, J.P., Cardamone, Simons, Mahoney, Dillon, JJ.

APPENDIX B

June 17, 1976

John K. Adams, Clerk
U. S. District Court
U.S. Court House
Buffalo, New York 14202

Re: Irvin Gill, et al. vs. Monroe County
Department of Social Services, et al.
Civ. 75-520

Dear Mr. Adams:

I am representing the Monroe County Department of Social Services and James Head, in the above entitled action and Mr. William J. Stevens, Joseph C. Pilato of counsel is representing the balance of the defendants in this case.

I am writing this letter to indicate my objections to inclusion in the record of some of the pleadings which have been filed with your Court. I am also writing this letter on behalf of Mr. Pilato who joins in with me and who has authorized me to write on his behalf.

On or about April 21, 1976 Judge Harold Burke dismissed the complaint for various reasons and the plaintiffs filed notice of appeal to the Second Circuit Court of Appeals in New York.

On June 15, 1976, in the afternoon, I, Mr. Pilato and Emmelyn Logan-Baldwin, attorney for the plaintiffs, met in the office of the district clerk in Rochester in order to index the pleadings which were being forwarded to your office. During the process of this indexing, I and Mr. Pilato objected to the inclusion in the record of pleadings indexed Nos. 7, 8, 9, 10, 11 and 12. These particular pleadings all pertain to discovery. The reason that I

and Mr. Pilato objected to their inclusion is that the decision of Judge Burke which is the object of the appeal does not in any way refer to or make a determination with reference to discovery. The court record will indicate that on or about February 9, 1976, Judge Burke stayed all motions with reference to discovery. Therefore since the motions have neither been granted nor denied, it is my opinion that they should not be part of an appeal record, nor should they be the subject for argument on the appeal.

We telephoned the Clerk's Office to ask for guidance as to how to handle this situation and based on information given to me and Mr. Pilato we were told that all the pleadings in the file would become part of the appeal record unless any pleadings were stipulated out of the record.

Ms. Logan-Baldwin refuses to stipulate out any of the above pleadings that I have referred to in this letter. Therefore I am writing this letter to inform the court of the objections of the respondents to inclusion of the above numbered pleadings. If it is necessary for us to appear in Buffalo for argument before one of the Judges with reference to this objection, we would be willing to do so upon receipt of an appointment.

It is my opinion that the record on appeal should not be sent to the Court of Appeals in New York until this issue is resolved.

I trust that the court will give this matter some consideration and advise us as to the procedure to be followed on this.

Very truly yours,

Frank P. Celona
Social Services Counsel

FPC:s
cc: Emmelyn Logan-Baldwin
Joseph C. Pilato

June 18, 1976

A. Daniel Fusaro
Clerk of U.S. Court of Appeals
Second Circuit
1702 U. S. Court House
Foley Square
New York, New York 10007

Re: Irvin Gill et al., vs. Monroe County Department of Social Services, et al.

Civ. 75-520

Dear Mr. Fusaro:

I am representing the Monroe County Department of Social Services and James Reed in the above entitled action and Mr. William J. Stevens, Joseph C. Pilato of counsel is representing the balance of the defendants in this case. I am writing this letter on my behalf and Mr. Pilato joins in with me on this letter.

The purpose of this letter is to advise you that the respondents hereby raise an objection to pleadings included in the record on appeal which has been sent to you and in the alternative, we object to the issue pertaining to discovery proceedings being made part of or the subject for argument on the appeal.

Attached to this letter is a copy of my letter dated June 17, 1976 written to the Clerk of the Court in Buffalo, New York, in which letter we noted objections to various pleadings pertaining to discovery, and further noted that it is my opinion that the issue of discovery should not be the subject matter of this appeal. The reason I wrote the letter to the Clerk in Buffalo was that Ms. Logan-Baldwin

advised us that on the argument of the appeal she intends to raise the issue about the discovery proceedings. I do not believe that is proper because Judge Burke's decision in no way affected discovery. My letter of June 17, 1976 clarifys my position. Today I received a telephone call from Ms. Carol Wright, Deputy Clerk at the District Court in Buffalo, New York, who advised me that she received my letter today but the record on appeal had already been sent by her to your office and therefore suggested that I contact your office.

I am aware of the fact that according to Rule 10 of the Appellate procedures all pleadings are included unless stipulated out of the record. Since Ms. Logan-Baldwin refused to stipulate them out and the record is already in your office then I presume that pleadings Nos. 7, 8, 9, 10, 11 and 12 are officially a part of the appeal record.

I do not object to the pleadings as pleadings, nor do I complain about the fact that they are now part of the record, I simply wish the Court to note that I object to the issue of discovery which Ms. Logan-Baldwin intends to raise on the argument of this appeal.

Would you kindly advise me as to how your Court will handle this matter?

Very truly yours,

Frank P. Celona
Social Services Counsel

FPC:s
Enc.
cc: Ms. Emmelyn Logan-Baldwin
Joseph C. Pilato
Nathaniel Fensterstock